Filed 5/19/09 In re J.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.S., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.S., Defendant and Appellant.	E046903 (Super.Ct.No. J213966) OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, County Counsel, and Kristina M. Robb, Deputy County Counsel, for Plaintiff and Respondent.

Linda Rehm, under appointment by the Court of Appeal, for Minor.

A juvenile court terminated the parental rights of Defendant and Appellant T.S. (mother) as to her son, J.S. (the child). On appeal, mother claims: 1) the court prejudicially erred in failing to appoint a guardian ad litem for mother, herself a minor, at the outset of the dependency proceedings; 2) there was insufficient evidence to support the finding that the child was likely to be adopted. We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

The child came to the attention of the San Bernardino County Children and Family Services (the department) in April 2007, a day after he was born, due to mother's history of mental illness and severe behavioral issues, including property destruction, fighting, cursing, yelling, screaming, injuring herself and others, and making threats to kill herself and others. Mother had displayed these behaviors at previous group home placements. Mother was 14 years old at the time of the child's birth. The child was placed with a family friend, T.G., upon discharge from the hospital.

On April 4, 2007, a petition was filed on behalf of the child pursuant to Welfare and Institutions Code[2] section 300, subdivision (b) (failure to protect), alleging that

[1] Counsel for the child filed a letter brief on January 26, 2009, urging us to affirm the court's order.

[2] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

mother had a history of mental illness that hindered her ability to adequately protect and parent the child, thereby placing him at risk for injury, neglect, and/or abuse.

The child was formally removed from mother's custody at the detention hearing. Mother was provided with visitation a minimum of once a week for one hour and services pending the jurisdictional hearing. The court ordered mother to reveal the name of the child's father, and mother named M.H., also a minor.

Jurisdiction/Disposition

In a jurisdiction/disposition report, the department recommended no services for mother. She had two pending charges at the Lancaster juvenile court—one for her assaultive behavior on a 12-year-old girl, and the other for assaulting a staff member in a prior group home, requiring the staff member to seek treatment at a hospital. Mother also had an incident prior to the child's birth where mother became emotionally upset and attempted to get out of a moving vehicle while her brothers and sisters were in the back seat. Additionally, her group home staff reported that prior to the child's birth, mother had made threats to harm herself and her unborn child, which appeared to be her way of manipulating the staff to get her way.

Attached to the jurisdictional/dispositional report was a psychiatric evaluation performed on mother in August 2005, when mother was 12 years old. The report noted that mother had problems with being oppositional, defiant, aggressive, manipulative, bossy, and lying and stealing. The report also noted that she had temper tantrums and was physically assaultive with adults and peers. At that time, mother was diagnosed with

bipolar affective disorder, but she had previously been diagnosed with impulse control disorder, attention deficit hyperactivity disorder, and bipolar disorder with psychotic features.

The jurisdictional/dispositional hearing was held on April 25, 2007. M.H. made his first appearance and was ordered to take a paternity test. At the hearing, the court noted some "significant problems" with the social worker's report and recommendation, and requested an updated report. The matter was continued for paternity testing and the updated report.

At the May 30, 2007, jurisdiction/disposition hearing, the court ordered the department to complete psychological evaluations of mother by July 6, 2007. The matter was contested by mother, and her request to bifurcate the jurisdiction and disposition hearings was granted.

The department filed an addendum report on July 5, 2007, changing its recommendation, and recommended services for mother. The department believed it would be in the child's best interest to offer services, since mother was residing in a new group home and was continuing to have weekly visits with the child, demonstrating mother's sincere desire in having her son placed in her care. In addition, the social worker reported that the paternity tests showed M.H. was not the child's biological father. Mother was unable to identify another father.

At the disposition hearing on July 6, 2007, mother signed a waiver of rights form, submitting to the social worker's reports. The court went through the waiver form in

great detail with mother to ensure that she had the chance to review the form with her attorney and to see if she had any questions. Mother indicated that it was explained to her. The court asked if mother understood she was giving up her rights to a formal hearing. She said yes, and her counsel joined in the waiver. The court declared the child a dependent of the court to be maintained in T.G.'s home. The court ordered that mother be provided with reunification services, which required her to complete general counseling, psychotropic medication monitoring, a psychological evaluation, and a parenting course and participate in a family training program.

Six-Month Review

The social worker reported that mother was currently residing at New Directions Group Home in Bakersfield, California. Mother had made significant progress since her placement there. In addition, mother had been participating in her case plan by attending a parenting class and an anger management program, and she was making significant progress in her parenting program. However, she had been suspended from school for engaging in harassment against school personnel and being disruptive during school activities. The social worker opined that mother's progress was not significant enough to place the child in her care.

The child continued to reside with T.G., appeared to be in good health, and was reaching his developmental milestones. He had developed a close and loving relationship with the foster mother and her family, and she provided him with excellent care. Mother visited the child at least once a week, but there was no bond between them, as mother did

not want to hold him for long periods of time. T.G. further noted that mother had very little patience with the child.

The social worker opined that mother was making an effort change her behavior but needed more time to complete her case plan. The social worker recommended six more months of services. At the six-month review hearing on January 8, 2008, the court ordered the reunification plan to remain in effect.

On April 18, 2008, a special hearing took place at mother's request. In light of recently published case law, mother's counsel requested a guardian ad litem be appointed for mother. The court appointed a guardian ad litem (an attorney) and set a further hearing for her guardian ad litem to address whether or not mother's interest had been adequately represented thus far. The court ordered that discovery be provided for the guardian ad litem.

At a special hearing on May 12, 2008, the guardian ad litem indicated that she had reviewed the file and had concerns that mother did not receive her case plan until August 15, 2007. The guardian ad litem requested a continuance of the 12-month hearing to mid-August, but since the 12-month hearing had been set for June 2, 2008, and the report had already been prepared, she noted that "any argument about that [continuing the section 366.21 hearing] would best be kept until June 2nd when we have a report of everything that has been occurring since January." Mother's counsel agreed.

12-month Review

In a 12-month review report, the social worker stated that mother continued to be "highly explosive and very unstable." Mother had been in three group homes within the previous six months due to her violent outbursts. In addition, she continued to be suspended from school and was nearly expelled for falsely accusing another student of molesting her. The social worker described mother as "a very disturbed child with a poor prognos[i]s for her own future and no ability to care for a child."

Although mother had been attending individual and group counseling/therapy and had completed two parts of her four-part parenting program, her counselor reported that mother had not benefited in any way from counseling. The counselor described mother as being extremely immature and lacking in any kind of insight. The counselor opined that mother was "in no way ready to parent and would pose a huge risk to a child given her ongoing anger issues and lack of any improvement in this area."

Furthermore, although mother had completed half of her parenting class, the social worker opined that she had not benefitted in any way from her attendance, as evidenced in her visits with the child. Mother was allowed weekly supervised visits at the group home. Both the group home staff and the foster mother reported there was absolutely no bond between mother and her baby. Mother showed no interest in the child, and, in fact, did not even want to hold him during visits. Mother presented a physical risk to the baby, as she became easily agitated with him for no apparent reason. The social worker stated the child was now at an age where he was "actually scared of his mother and becomes

distressed when he has to see her." The social worker opined that the visits were traumatic for the child, who responded with fear when he saw mother. The social worker asked that the visits be stopped.

The 12-month hearing on June 2, 2008, was set contested on behalf of mother and continued. The social worker then filed an addendum report recommending that services be terminated, and opined there was not a substantial probability that the child could be safely returned to mother's care if additional services were given. The social worker noted that mother had been given all of the appropriate services to assist in reunification, but due to her mental illness and low intellectual functioning, none of the services made a significance difference. Mother even told the social worker that she was aware she could not care for the child and that he was better off being adopted by his caretaker. The social worker pointed out that services had also placed stress on mother, who had been prompted by others to try to get her son back. Mother appeared to have personal goals, such as wanting to get a job, do well in school, and "hang out" with friends. The social worker opined that mother did not see the child as a priority in her life. In June 2008, mother called the social worker asking to cancel her visit with the child so she could go to an amusement park. The social worker said they could reschedule the visit so mother could do both, but after getting off the phone, mother just said, "'I don't have to do my visit.'" Mother did not mention rescheduling the visit.

In a second addendum report, the social worker stated that mother ran away from her group home with another resident to meet a man she had met on the Internet. On

June 9, 2008, the other resident turned herself in to the police and reported that she and mother were told that in order to stay at the man's home they had to have sex with him and another man. They did. The men told mother and the other resident that they wanted them to prostitute for them. The other resident left, but mother stayed. Then on June 11, 2008, the social worker received a call that mother was arrested and charged with burglary. Mother was in juvenile hall, and it was unknown at the time of the report whether she would be made a section 600 ward.

The contested 12-month review hearing was held on June 17, 2008. Following admission of the evidence, testimony from the social worker, and arguments from counsel, the juvenile court found that reasonable services were provided to mother and stated: "I cannot find any substantial probability—I can't find even anything in the remotest of remote possibilities that the minor will be returned to his mom by the .22 date in October." The court specifically took note of the fact that mother was currently in custody and that she had failed to progress in her case plan. The court terminated services and set a section 366.26 hearing.

Writ Petition

Two days later, mother filed a Notice of Intent to file a writ petition. In her writ petition, she contended the trial court erred in finding that she was provided with reasonable services. This court denied the writ petition.

Section 366.26 and Adoption Assessment

The social worker filed a section 366.26 report recommending that parental rights be terminated and that adoption be implemented as the permanent plan. At the time of the report, the child was a one-year-old in good health, with the exception of chronic ear infections. The child was scheduled to have tubes surgically placed in his ears to correct this problem. Otherwise, the child was developmentally on target. Additionally, the social worker noted that mother's visits with the child were terminated on June 16, 2008, since the visits "did not go well due to [mother's] poor impulse control and anger issues . . . ."

At the section 366.26 hearing on August 28, 2008, the matter was set contested on behalf of mother. The court continued the hearing in order to allow the adoption assessment report to be completed.

The adoption assessment report was filed on September 12, 2008. The report stated the child had no medical concerns. Prior to the scheduled ear tubes surgery, the ear specialist determined that the child's ears had healed, and tubes were no longer necessary. Furthermore, the social worker reported that the child was emotionally bonded to T.G. and the other children in her home. The child had been placed in that home on April 1, 2007, and T.G. had provided a stable and secure home for him since then. The child regarded her as his mother and looked to her for care, guidance, and support. T.G. considered the child her son and ensured that the child's needs would be met. She was committed to the child and eager to adopt him.

The contested section 366.26 hearing took place on October 15, 2008. At the outset of the hearing, mother's counsel stated that mother was not contesting adoptability. At that point, the adoption worker was excused. Mother testified. When asked if she believed she had a relationship with the child, she said, "No, I don't." In her closing argument, mother's counsel argued for legal guardianship, although she said "we agree that [the child] is [a young adoptable child]." The court found it likely the child would be adopted, terminated parental rights, and selected adoption as the permanent plan.

ANALYSIS

I. Mother Failed to Show She Was Prejudiced by Not Having a Guardian Ad Litem Appointed at the Beginning of the Proceedings

Mother contends that the order terminating parental rights must be reversed and all prior orders vacated because the court failed to appoint a guardian ad litem for her at the inception of the dependency proceedings. At the outset, we note that mother was represented by counsel from the beginning of the proceedings but did not raise the issue of not having a guardian ad litem until just before the 12-month review hearing. The court then appointed a guardian ad litem at her request. Assuming, without deciding, that mother did not waive her right to raise this issue, we conclude her interests were not prejudiced by the court's failure to appoint a guardian ad litem sooner.[3]

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[3] On January 21, 2009, the department filed a Request for Judicial Notice as to the legislative history regarding Senate Bill 1612 (SB1612) concerning amendments made to Code of Civil Procedure section 372, relating to guardians ad litem. We reserved ruling for consideration with the appeal. The amendments to which the legislative history in question relates took effect January 1, 2009, which is after the trial court here issued its

[footnote continued on next page]

Code of Civil Procedure section 372, subdivision (a) provides in relevant part: "When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, incompetent person, or person for whom a conservator has been appointed . . . ." The court in *In re M.F.* (2008) 161 Cal.App.4th 673, 679 (*M.F.*)) held that the juvenile court has a sua sponte duty to appoint a guardian ad litem for a parent who is a minor. In that case, the court concluded that the failure to appoint a guardian ad litem for the minor parent resulted in a miscarriage of justice, and such error "necessitate[d] that the proceedings return to 'square one,' as [the minor parent] was entitled to the appointment of a guardian ad litem at the commencement of the proceedings." (*Id.* at p. 682.) In other words, if a person's interests are "not substantially prejudiced as a result [of the failure to appoint a guardian ad litem], there is no reversible error. [Citation.] We do not set aside the judgment unless a different result would have been probable had the error not occurred. [Citation.]" (*In re A.C.* (2008) 166 Cal.App.4th 146, 157 (*A.C.*).)

[footnote continued from previous page]
order terminating parental rights. The amendment, and therefore the legislative history, are not relevant to any issue in this appeal. Thus, the department's judicial notice request is denied.

"'[A] guardian ad litem's role is more than an attorney's but less than a party's. The guardian may make tactical and even fundamental decisions affecting the litigation but always with the interest of the guardian's charge in mind. Specifically, the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit.' [Citations.] . . . It is the duty of a guardian ad litem to protect or defend a suit, as the case may be." (*M.F., supra,* 161 Cal.App.4th at p. 680.)

Here, the guardian ad litem appointed to mother was an attorney. Upon appointing her, the court set a further hearing in order to give the guardian ad litem an opportunity to review the record and ensure that mother's rights had been adequately represented. The court ordered that discovery be provided for the guardian ad litem. After discussing the case with mother's counsel and reviewing the record, the guardian ad litem found only one concern regarding the late adoption of a case plan for mother. Mother's counsel also raised the issue of visits missed due to the foster mother cancelling them. The court addressed all of the concerns. At the section 366.26 hearing, the guardian ad litem stated that she agreed with the recommendations of mother's counsel, and that she felt mother's rights and interests had been protected. The guardian ad litem adequately fulfilled her duty to protect mother's interests.

Moreover, it is not probable that mother's parental rights would not have been terminated, had the court appointed a guardian ad litem at the start of the proceedings. (*A.C., supra,* 166 Cal.App.4th at p. 157.) Mother was given 12 months of reunification

services. Yet, due to her mental illness and low intellectual functioning, none of the services made a significant difference. The social worker said that mother continued to be "highly explosive and very unstable" and that she had "ongoing violent behavior and constant tantrums." Mother's counselor reported that mother had not benefited in any way from counseling, and described mother as extremely immature and lacking in any kind of insight. The counselor opined that mother was "in no way ready to parent and would pose a huge risk to a child given her ongoing anger issues and lack of any improvement in this area." Mother's instructor for her parenting and anger management classes similarly did not believe mother was able to "in any way" care for her son. Mother admitted to the social worker that she could not care for the child and that he was better off being adopted by his caretaker. Significantly, there was absolutely no bond between mother and the child. During visits, mother showed no interest in the child, and in fact did not even want to hold him during visits. She became easily agitated with him for no apparent reason. In fact, visitation was terminated on June 16, 2008, due to mother's "poor impulse control and anger issues." At the section 366.26 hearing, mother admitted she had no relationship with the child. In view of the foregoing, the end result here was certainly correct.

Mother claims that a guardian ad litem would have made a difference by: 1) contesting the child's placement with T.G.; 2) seeking more contact between mother and the child "early in the case"; 3) asking the court to transfer the case to a different county (i.e., Los Angeles or Kern County); and 4) asking for extended services earlier in

the case. However, mother fails to explain, and we do not see, how any of these actions would have made a difference in the outcome. Notably, mother had plenty of visits with the child, but she still failed to bond with him. Furthermore, the court extended mother's services to 12 months, but she simply failed to progress.

In her reply brief, mother additionally argues that a guardian ad litem could have asked for the child to be placed with the maternal grandmother at the outset of the proceedings, thereby avoiding dependency jurisdiction altogether. However, the case she cited in support of her proposition, *In re S.D.* (2002) 99 Cal.App.4th 1068, is completely inapposite. That case involved section 300, subdivision (g), which provides for dependency jurisdiction when a parent is incarcerated and unable to arrange for the child's care. Since the mother was incarcerated but had two sisters who expressed immediate willingness to take custody of the child, the appellate court concluded that the social services agency failed to prove an essential element of its jurisdictional petition. Thus, the dependency could not be sustained. (*In re S.D.*, *supra*, at p. 1083.) In the instant case, jurisdiction was sustained based on section 300, subdivision (b), not subdivision (g).

Ultimately, mother was not prejudiced by the court's failure to appoint a guardian ad litem at the commencement of the dependency proceedings.

II. The Court Properly Found That the Child Was Adoptable

Mother contends that the court's finding of adoptability was not supported by substantial evidence. She further claims the child was deemed adoptable solely on T.G.'s

willingness to adopt him, and thus, the court was required to determine whether there were legal impediments to her adopting the child. We disagree.

"The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. [Citations.] In making this determination, the juvenile court must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family. [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*. [Citation.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650 (*Sarah M.*).) "In reviewing the juvenile court's order, we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the child] was likely to be adopted within a reasonable time. [Citations.]" (*In re Erik P.*, *supra*, at p. 400.)

There was substantial evidence to support the court's finding of adoptability. The adoption assessment report stated that the child was a healthy 17-month-old African-American boy who appeared to be on target developmentally. He was able to walk, run,

and play with the children in his home. There were no medical concerns about him, since his ear infection had healed and surgery was no longer necessary.

Moreover, by the time of the section 366.26 hearing, the child had lived with the prospective adoptive parent, T.G., for approximately 18 months. She had taken good care of the child and loved him as her own son. As a result, the child was emotionally bonded to her and considered her to be his mother. T.G. stated she was committed to providing for the child and was eager to proceed with the adoption process.

Mother claims we should apply the rule stated in *In re Valerie W.* (2008) 162 Cal.App.4th 1, 15 (*Valerie W.*) that "[w]hen a child is deemed adoptable based solely on a particular family's willingness to adopt the child, the trial court must determine whether there is a legal impediment to adoption. [Citation.]" She then relies upon *Valerie W.* to argue that the assessment report was deficient in that it failed to include the prospective adoptive parent's social history (i.e., criminal records and prior referrals for child abuse) or T.G.'s husband's criminal history, which was a potential legal impediment. *Valerie W.* is factually distinguishable. In that case, the court "made a specific finding of adoptability when it determined the children were likely to be adopted by Vera [the caregiver]." (*Ibid.*, italics omitted.) At the time it terminated parental rights, the court also noted that "[the caregiver] had taken appropriate steps to start the adoptive process and clearly intended to adopt both children" and it "designated [the caregiver] as the children's prospective adoptive parent." (*Id.* at p. 7, fn. omitted.) In contrast, the court in the instant case simply stated that "there [was] clear and convincing evidence that it [was]

likely the child [would] be adopted." Thus, unlike *Valerie W.*, the court did not deem the child adoptable "based solely on a particular family's willingness to adopt the child." (*Id.* at p. 15.) Thus, the court was not required to determine whether there was a legal impediment to adoption.

In any event, the adoption assessment report clearly stated that T.G. recently filed for a divorce, and that she preferred to be single now and intended to focus on her children. Thus, any evidence of T.G.'s husband's criminal history was irrelevant. Moreover, T.G. reported no history of substance abuse or that she had a criminal background.

Mother also raises the issue that the child had speech and language delays. However, the social worker stated his "speech (pronunciation) is a little off because of his ear infections." His doctor initially anticipated that the child's speech would return to normal after ear tubes were put in. The doctor subsequently determined that ear tubes were no longer necessary since the ear infection cleared up. Thus, the child's minor medical problem resolved itself.

Mother additionally asserts that, other than the current caretaker, the adoption assessment report did not mention any prospective adoptive families. However, to be considered adoptable, "it is not necessary that the [child] already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*Sarah M., supra*, 22 Cal.App.4th at p. 1649.) Thus, mother's assertion that

no other prospective adoptive families were mentioned was irrelevant to the finding of adoptability.

We conclude that the court properly found clear and convincing evidence that the child was adoptable.

DISPOSITION

The order is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.